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**SENATE BILL 5566**

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**State of Washington 64th Legislature 2015 Regular Session**

**By** Senators Frockt, Hasegawa, Jayapal, Darneille, Keiser, Conway, Cleveland, Kohl-Welles, Nelson, McCoy, Chase, McAuliffe, Fraser, and Billig

AN ACT Relating to simplifying and enforcing employee status under employment laws to ensure fairness to employers and employees and address the underground economy; amending RCW 39.12.010, 39.12.050, 50.04.100, 50.04.298, 50.12.070, 50.12.072, 50.24.070, 50.04.100, 51.08.070, and 51.08.180; reenacting and amending RCW 49.48.082 and 49.46.010; adding a new section to chapter 39.12 RCW; adding new sections to chapter 49.52 RCW; adding a new section to chapter 49.48 RCW; adding a new section to chapter 49.46 RCW; adding new sections to chapter 50.04 RCW; adding a new section to chapter 51.12 RCW; adding a new chapter to Title 49 RCW; creating new sections; repealing RCW 39.12.100, 50.04.140, 50.04.145, 51.08.181, and 51.08.195; and prescribing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec.**  The legislature finds that underground economic activity in this state results in millions of dollars of lost revenue to the state and is unfair to workers and law-abiding businesses. Misclassification is workplace fraud. Theft of wages by employers through misclassification is a significant problem, particularly in low-wage industries. The legislature intends to improve compliance with wage-related laws to help address the problems of the underground economy, level the playing field for honest employers and contractors, and protect workers.

NEW SECTION. **Sec.**  This chapter may be known and cited as the employee fair classification act.

NEW SECTION. **Sec.**  The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Department" means the department of labor and industries.

(2) "Director" means the director of the department of labor and industries.

(3) "Employ" means to suffer or permit to work.

(4)(a) "Employee" means a person who performs labor or services for an employer. A person may be an employee of two or more employers at the same time.

(b) "Employee" does not include a bona fide independent contractor.

(c) "Employee" also does not include:

(i) An individual employed in the capacity of an outside salesperson paid solely by way of commission, as defined and delimited by rule of the director;

(ii) An individual employed on a casual and sporadic basis; or

(iii) An individual who performs services for an educational, charitable, religious, government, or nonprofit organization and who offers his or her services freely and without pressure or coercion, direct or implied, and without any contemplation or expectation of payment. An individual who receives reimbursement for actual expenses or who receives maintenance, which includes costs for meals and transient lodging incurred while performing volunteer duties, does not lose his or her status as a nonemployee.

(5)(a) "Employer" means any of the following that employ a person: (i) An individual; (ii) any form of business entity, or the receiver, trustee, or successor of a business entity; (iii) an administrator or executor of an estate; or (iv) the state or any agency, instrumentality, or political subdivision of the state. "Employer" includes an individual or entity that acts directly or indirectly in the interest of an employer in relation to employing a person. More than one entity may be the "employer," including in circumstances where one entity controls, is controlled by, or is under common control with another employer, or where one entity exerts control over the operations of another employer.

(b) "Employer" does not include agencies, authorities, or instrumentalities of the United States, its possessions and territories, the commonwealth of Puerto Rico, or the District of Columbia.

(6) "Front pay" means the compensation the employee would earn if reinstated to his or her former position.

(7)(a) "Independent contractor" means an individual who performs labor or services for a party when either:

(i)(A) The individual is and will continue to be free from control or direction over the performance of the labor or services by the party for whom the labor or services are performed, both under the contract of labor or service and in fact. Control or direction includes the right to control or direct as well as general control or direction over the individual's physical activities;

(B) The labor or service is either outside the usual course of business for which the labor or service is performed, or the labor or service is performed outside of all the places of business of the enterprise for which the labor or service is performed; and

(C) The individual is customarily engaged in an independently established trade, occupation, business, or profession of the same nature as that involved in the contract of labor or service; or

(ii)(A) The individual is and will continue to be free from control or direction over the performance of the labor or services by the party for whom the labor or services are performed, both under the contract of labor or service and in fact. Control or direction includes the right to control or direct as well as general control or direction over the individual's physical activities;

(B) The individual's business is not financially dependent on the relationship with the party for whom the labor or services are performed and the business continues after the cancellation or destruction of the relationship with that party;

(C) The individual has a substantial investment of capital in the individual's business beyond ordinary tools and equipment and a personal vehicle;

(D) The individual gains profits and bears losses from the business as a result of his or her managerial skills and substantial investment of capital in the individual's business;

(E) The individual makes his or her labor or services available to the general public or the business community on a continuing basis;

(F) The individual files at the next applicable filing period, both under the contract of service and in fact, a schedule of expenses with the internal revenue service for the type of business the individual is conducting;

(G) The party for whom the labor or services are performed does not represent the individual as an employee of that party to its customers;

(H) The individual has the right, under contract and in fact, to perform similar labor or services for others on whatever basis and whenever he or she chooses;

(I) The individual has an active and valid certificate of registration with the department of revenue and an active and valid account with any other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has registered for and received a unified business identifier number from the state of Washington; and

(J) The individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business that the individual is conducting.

(b) In determining whether an individual is an independent contractor, acts taken by an employer to comply with local, state, or federal laws or regulations may not be considered as proof of independent contractor status.

(8) "Misclassification" means designating an employee as a nonemployee of the employer.

(9)(a) "Pattern or practice" means that, in addition to the current violation, within the previous ten years the employer was:

(i) Convicted of a criminal violation of a state or local law concerning nonpayment of wages;

(ii) Subject to a court order entering final judgment for a violation of this chapter or chapter 39.12, 49.46, 49.48, or 49.52 RCW, and the judgment was not satisfied or current within thirty days of the later of: (A) The expiration of the time for appealing the order; or (B) if a timely appeal was made, the date of the final resolution of the appeal; or

(iii) Subject to a final and binding citation and notice of assessment from the department for a violation of this chapter or chapter 39.12 or 49.48 RCW, and the citation and penalty was not satisfied or current within thirty days of the date the citation became final and binding.

(b) For purposes of this subsection (9), an employer includes a successor employer, as defined in RCW 49.48.082.

(10) "Person" means a natural person, firm, partnership, corporation, association, or organization.

(11) "Willful" means a knowing and intentional action that is neither accidental nor the result of a bona fide dispute.

NEW SECTION. **Sec.**  (1) An employer-employee relationship exists when an individual performs labor or services for an employer. The party asserting that an individual is not an employee must establish by a preponderance of the evidence that the individual is an independent contractor or is otherwise not an employee under this chapter.

(2) A general contractor is not responsible for violations of a bona fide independent contractor or subcontractor under this chapter unless the general contractor exerts substantial control over the day-to-day work of the independent contractor or subcontractor. For purposes of this subsection:

(a) "General contractor" means the contractor required to be registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW whose business operations for a project require the use of more than one building trade or craft upon a single job or project, under a single building permit, and who has responsibility to superintend the project as a whole.

(b) "Subcontractor" means a contractor who engages in a business that is required to be registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW and who is not a general contractor.

NEW SECTION. **Sec.**  (1) An employer may not willfully misclassify an employee as an independent contractor.

(2) A person may not charge an employee who has been misclassified as an independent contractor a fee, or make any deductions from compensation for any purpose, including for goods, materials, space rental, services, government licenses, repair, equipment maintenance, or fines arising from the employment where any of the acts would have violated the law if the individual had not been misclassified.

(3) A person may not require or request an employee to enter into an agreement or sign a document that results in the misclassification of the employee as an independent contractor or otherwise does not accurately reflect the employee's relationship with the employer.

(4) A person may not perform the following acts for the purpose of facilitating or evading detection of a violation of this chapter:

(a) Form, assist in, or induce the formation of a corporation, partnership, limited liability company, or other business entity; or

(b) Pay or collect a fee for use of a foreign or domestic corporation, partnership, limited liability company, or other business entity.

(5) A person may not, for remuneration, conspire with, aid and abet, assist, or advise an employer with the intent of violating this chapter.

NEW SECTION. **Sec.**  (1) The department may conduct an investigation if it obtains information indicating a person may have violated this chapter, but the department may not investigate a violation of this chapter that occurred more than three years before the date of the violation. For the purposes of this section, a violation occurs from the initial date of misclassification and for as long as the employee continues to be misclassified. The three-year period is tolled during any period of time that an employer, any of its agents, or any person acting on behalf of the employer deters an individual from filing a complaint under this section.

(2) If the department determines that a person violated this chapter, it may:

(a) For a violation of section 8 of this act, order the employer to pay a civil penalty of not less than one thousand dollars and not more than ten thousand dollars;

(b) For a violation of section 5 of this act, order the person to pay a civil penalty of: (i) Not less than one thousand dollars and not more than ten thousand dollars per employee; or (ii) if the person has engaged in a pattern or practice of violations, not less than ten thousand dollars and not more than twenty-five thousand dollars per employee;

(c) For a violation of section 5 of this act, order persons, including employers, to jointly and severally pay the following: (i) Three times the amount of wages, salary, and employment benefits denied or withheld, except benefits under Title 50 or 51 RCW; and (ii) reimbursement for taxes and the value of any benefits paid by the employee;

(d) In addition, for a violation of section 5 of this act, order the employer to pay any taxes owed, reinstate the employee, and properly classify the employee. The director may award front pay in lieu of reinstatement;

(e) Determine whether to initiate collection procedures pursuant to RCW 51.16.150 through 51.16.190, and send a copy of its determination, including any supporting documentation, to the employment security department; and

(f) The department must consider referrals based on a court finding of a violation of section 5 of this act to determine whether to initiate collection procedures.

(3) An employer may appeal the department's determination pursuant to RCW 49.48.084.

(4) The department must deposit civil penalties collected under this chapter into the employee fair classification act account created in section 9 of this act.

NEW SECTION. **Sec.**  (1) An individual aggrieved by a violation of section 5 of this act may bring suit on behalf of himself or herself or on behalf of any other individual who is similarly situated.

(2) If a court determines that a person or persons, including employers, violated section 5 of this act, it:

(a) Shall order persons, including employers, to jointly and severally pay the greater of:

(i) Three times the amount of any wages including overtime, salary, and employment benefits unlawfully denied or withheld except benefits under Titles 50 and 51 RCW; or

(ii) Statutory damages for each employee aggrieved by the violation. Statutory damages must not be less than one thousand dollars and not more than ten thousand dollars per employee, unless the person engaged in a pattern or practice of violations, in which case the statutory damages must be not less than ten thousand dollars and not more than twenty-five thousand dollars per employee;

(b) May order persons, including employers, to jointly and severally pay the employee reimbursement for any taxes and the value of any benefits paid by the employee; and

(c) Shall order persons, including employers, to jointly and severally pay attorneys' fees and costs.

(3) If a court determines that an employer violated section 5 of this act, it may order the employer to pay any taxes owed and award injunctive or other equitable relief, including reinstatement and reclassification of the employee with terms and conditions at least as favorable as those that applied when the employee was misclassified, including rate of compensation, value of any benefits, and hours of work. The court may award front pay in lieu of reinstatement.

(4) A civil action under this section must be brought no later than three years after the violation occurred. For the purposes of this section, a violation occurs from the initial date of misclassification and for as long as the employee continues to be misclassified. The three-year period is tolled during any period of time that an employer, any of its agents, or any person acting on behalf of the employer deters an individual from bringing an action under this section.

NEW SECTION. **Sec.**  (1) If an employer engages an individual to perform labor or services for remuneration and considers the individual to be an independent contractor, the employer shall post and keep posted the following notice:

"Every worker has the right to be properly classified as an employee rather than an independent contractor if the individual does not meet the requirements of an independent contractor under the law known as the employee fair classification act.

If you believe you or someone else has been improperly classified as an independent contractor under the employee fair classification act, you have the right to challenge this classification by filing a complaint with the department of labor and industries or by bringing an action in state court."

(2) The notice required by this section must be in English, Spanish, and any other language or languages primarily spoken by the majority of the workforce. The notice must be posted in a conspicuous place in each of the employer's offices in the state and at each job site where a worker classified as an independent contractor performs labor or services.

NEW SECTION. **Sec.**  The employee fair classification act account is created in the state treasury. All receipts from civil penalties issued under section 6 of this act must be deposited in the account. Moneys in the account may be spent only after appropriation. Expenditures from the account may be used only for enforcement of this chapter.

NEW SECTION. **Sec.**  The department may adopt rules to implement this chapter. In addition, the department may develop a plan for strategic enforcement of this chapter, prioritizing industries and workplaces with a high concentration of violations.

**PREVAILING WAGE**

**Sec.**  RCW 39.12.010 and 1989 c 12 s 6 are each amended to read as follows:

(1) The "prevailing rate of wage," for the intents and purposes of this chapter, shall be the rate of hourly wage, usual benefits, and overtime paid in the locality, as hereinafter defined, to the majority of workers, laborers, or mechanics, in the same trade or occupation. In the event that there is not a majority in the same trade or occupation paid at the same rate, then the average rate of hourly wage and overtime paid to such laborers, workers, or mechanics in the same trade or occupation shall be the prevailing rate. If the wage paid by any contractor or subcontractor to laborers, workers, or mechanics on any public work is based on some period of time other than an hour, the hourly wage for the purposes of this chapter shall be mathematically determined by the number of hours worked in such period of time.

(2) The "locality" for the purposes of this chapter shall be the largest city in the county wherein the physical work is being performed.

(3) The "usual benefits" for the purposes of this chapter shall include the amount of:

(a) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program; and

(b) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to workers, laborers, and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the workers, laborers, and mechanics affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other federal, state, or local law to provide any of such benefits.

(4) "Employee" has the same meaning as "laborers, workers, and mechanics."

(5) "Employer" and "independent contractor" have the same meanings as in section 3 of this act.

(6)(a) "Pattern or practice" means that, in addition to the current violation, within the previous ten years the employer was:

(i) Convicted of a criminal violation of a state or local law concerning nonpayment of wages;

(ii) Subject to a court order entering final judgment for a violation of this chapter or chapter 49.46, 49.48, 49.52, or 49.--- RCW (the new chapter created in section 31 of this act), and the judgment was not satisfied or current within thirty days of the later of: (i) The expiration of the time for appealing the order; or (ii) if a timely appeal was made, the date of the final resolution of the appeal; or

(iii) Subject to a final and binding citation and notice of assessment from the department of labor and industries for a violation of this chapter or chapter 49.48 RCW, and the citation and penalty was not satisfied or current within thirty days of the date the citation became final and binding.

(b) For purposes of this subsection (6), an employer includes a successor employer, as defined in RCW 49.48.082.

(7) An "interested party" for the purposes of this chapter shall include a contractor, subcontractor, an employee of a contractor or subcontractor, an organization whose members' wages, benefits, and conditions of employment are affected by this chapter, and the director of labor and industries or the director's designee.

NEW SECTION. **Sec.**  A new section is added to chapter 39.12 RCW to read as follows:

An employer-employee relationship exists when a laborer, worker, or mechanic performs labor for an employer. The party asserting that an individual is not an employee must establish by a preponderance of the evidence that the individual is an independent contractor.

**Sec.**  RCW 39.12.050 and 2009 c 219 s 3 are each amended to read as follows:

(1) Any contractor or subcontractor who files a false statement or fails to file any statement or record required to be filed under this chapter and the rules adopted under this chapter, shall, after a determination to that effect has been issued by the director after hearing under chapter 34.05 RCW, forfeit as a civil penalty the sum of five hundred dollars for each false filing or failure to file, and shall not be permitted to bid, or have a bid considered, on any public works contract until the penalty has been paid in full to the director. The civil penalty under this subsection shall not apply to a violation determined by the director to be an inadvertent filing or reporting error. Civil penalties shall be deposited in the public works administration account.

To the extent that a contractor or subcontractor has not paid wages at the rate due pursuant to RCW 39.12.020, and a finding to that effect has been made as provided by this subsection, such unpaid wages shall constitute a lien against the bonds and retainage as provided in RCW 18.27.040, 19.28.041, 39.08.010, and 60.28.011.

(2) If a contractor or subcontractor is found to have ((~~violated the provisions of subsection (1) of this section for a second time within a five year period~~))engaged in a pattern or practice of violations, the contractor or subcontractor shall be subject to the sanctions prescribed in subsection (1) of this section and shall not be allowed to bid on any public works contract for one year. The one year period shall run from the date of notice by the director of the determination of noncompliance. When an appeal is taken from the director's determination, the one year period shall commence from the date of the final determination of the appeal.

The director shall issue his or her findings that a contractor or subcontractor has violated the provisions of this subsection after a hearing held subject to the provisions of chapter 34.05 RCW.

**WAGE DEDUCTIONS**

NEW SECTION. **Sec.**  A new section is added to chapter 49.52 RCW to read as follows:

(1) "Employer" and "independent contractor" have the same meanings as in section 3 of this act.

(2) "Employee" has the same meaning as in section 3(4) (a) and (b) of this act.

NEW SECTION. **Sec.**  A new section is added to chapter 49.52 RCW to read as follows:

(1) An employer-employee relationship exists when an individual performs labor or services for an employer. The party asserting that an individual is not an employee must establish by a preponderance of the evidence that the individual is an independent contractor.

(2) A general contractor is not responsible for violations of a bona fide independent contractor or subcontractor under this chapter unless the general contractor exerts substantial control over the day-to-day work of the independent contractor or subcontractor. For purposes of this section, "general contractor" and "subcontractor" have the same meanings as in section 4(2) (a) and (b) of this act.

**WAGE PAYMENT ACT**

**Sec.**  RCW 49.48.082 and 2010 c 42 s 1 are each reenacted and amended to read as follows:

The definitions in this section apply throughout this section and RCW 49.48.083 through 49.48.086:

(1) "Citation" means a written determination by the department that a wage payment requirement has been violated.

(2) "Department" means the department of labor and industries.

(3) "Determination of compliance" means a written determination by the department that wage payment requirements have not been violated.

(4) "Director" means the director of the department of labor and industries, or the director's authorized representative.

(5) "Employee" has the meaning provided in: (a) RCW 49.46.010 for purposes of a wage payment requirement set forth in RCW 49.46.020 or 49.46.130; and (b) ((~~RCW 49.12.005~~)) section 3(4) (a) and (b) of this act for purposes of a wage payment requirement set forth in RCW 49.48.010, 49.52.050, or 49.52.060.

(6) "Employer" ((~~has the meaning provided in RCW 49.46.010 for purposes of a wage payment requirement set forth in RCW 49.46.020, 49.46.130, 49.48.010, 49.52.050, or 49.52.060~~)) and "independent contractor" have the same meanings as in section 3 of this act.

(7) "Notice of assessment" means a written notice by the department that, based on a citation, the employer shall pay the amounts assessed under RCW 49.48.083.

(8) "Repeat willful violator" means any employer that has been the subject of a final and binding citation and notice of assessment for a willful violation of a wage payment requirement within three years of the date of issue of the most recent citation and notice of assessment for a willful violation of a wage payment requirement.

(9) "Successor" means any person to whom an employer quitting, selling out, exchanging, or disposing of a business sells or otherwise conveys in bulk and not in the ordinary course of the employer's business, more than fifty percent of the property, whether real or personal, tangible or intangible, of the employer's business.

(10) "Wage" has the meaning provided in RCW 49.46.010.

(11) "Wage complaint" means a complaint from an employee to the department that asserts that an employer has violated one or more wage payment requirements and that is reduced to writing.

(12) "Wage payment requirement" means a wage payment requirement set forth in RCW 49.46.020, 49.46.130, 49.48.010, 49.52.050, or 49.52.060, and any related rules adopted by the department.

(13) "Willful" means a knowing and intentional action that is neither accidental nor the result of a bona fide dispute, as evaluated under the standards applicable to wage payment violations under RCW 49.52.050(2).

NEW SECTION. **Sec.**  A new section is added to chapter 49.48 RCW to read as follows:

(1) An employer-employee relationship exists when an individual performs labor or services for an employer. The party asserting that an individual is not an employee must establish by a preponderance of the evidence that the individual is an independent contractor or is otherwise not an employee under this chapter.

(2) A general contractor is not responsible for violations of a bona fide independent contractor or subcontractor under this chapter unless the general contractor exerts substantial control over the day-to-day work of the independent contractor or subcontractor. For purposes of this section, "general contractor" and "subcontractor" have the same meaning as in section 4(2) (a) and (b) of this act.

**MINIMUM WAGE ACT**

**Sec.**  RCW 49.46.010 and 2013 c 141 s 1 are each reenacted and amended to read as follows:

As used in this chapter:

(1) "Director" means the director of labor and industries;

(2) ((~~"Employ" includes to permit to work~~)) "Department," "employ," and "employer" have the same meanings as in section 3 of this act;

(3) "Employee" ((~~includes any individual employed by an employer but~~)) has the same meaning as in section 3(4) (a) and (b) of this act and shall not include:

(a) Any individual (i) employed as a hand harvest laborer and paid on a piece rate basis in an operation which has been, and is generally and customarily recognized as having been, paid on a piece rate basis in the region of employment; (ii) who commutes daily from his or her permanent residence to the farm on which he or she is employed; and (iii) who has been employed in agriculture less than thirteen weeks during the preceding calendar year;

(b) Any individual employed in casual labor in or about a private home, unless performed in the course of the employer's trade, business, or profession;

(c) Any individual employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesperson as those terms are defined and delimited by rules of the director. However, those terms shall be defined and delimited by the human resources director pursuant to chapter 41.06 RCW for employees employed under the director of personnel's jurisdiction;

(d) Any individual engaged in the activities of an educational, charitable, religious, state or local governmental body or agency, or nonprofit organization where the employer-employee relationship does not in fact exist or where the services are rendered to such organizations gratuitously. If the individual receives reimbursement in lieu of compensation for normally incurred out-of-pocket expenses or receives a nominal amount of compensation per unit of voluntary service rendered, an employer-employee relationship is deemed not to exist for the purpose of this section or for purposes of membership or qualification in any state, local government, or publicly supported retirement system other than that provided under chapter 41.24 RCW;

(e) Any individual employed full time by any state or local governmental body or agency who provides voluntary services but only with regard to the provision of the voluntary services. The voluntary services and any compensation therefor shall not affect or add to qualification, entitlement, or benefit rights under any state, local government, or publicly supported retirement system other than that provided under chapter 41.24 RCW;

(f) Any newspaper vendor, carrier, or delivery person selling or distributing newspapers on the street, to offices, to businesses, or from house to house and any freelance news correspondent or "stringer" who, using his or her own equipment, chooses to submit material for publication for free or a fee when such material is published;

(g) Any carrier subject to regulation by Part 1 of the Interstate Commerce Act;

(h) Any individual engaged in forest protection and fire prevention activities;

(i) Any individual employed by any charitable institution charged with child care responsibilities engaged primarily in the development of character or citizenship or promoting health or physical fitness or providing or sponsoring recreational opportunities or facilities for young people or members of the armed forces of the United States;

(j) Any individual whose duties require that he or she reside or sleep at the place of his or her employment or who otherwise spends a substantial portion of his or her work time subject to call, and not engaged in the performance of active duties;

(k) Any resident, inmate, or patient of a state, county, or municipal correctional, detention, treatment or rehabilitative institution;

(l) Any individual who holds a public elective or appointive office of the state, any county, city, town, municipal corporation or quasi municipal corporation, political subdivision, or any instrumentality thereof, or any employee of the state legislature;

(m) All vessel operating crews of the Washington state ferries operated by the department of transportation;

(n) Any individual employed as a seaman on a vessel other than an American vessel;

(4) ((~~"Employer" includes any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee;~~

~~(5)~~)) "Occupation" means any occupation, service, trade, business, industry, or branch or group of industries or employment or class of employment in which employees are gainfully employed;

((~~(6)~~)) (5) "Retail or service establishment" means an establishment seventy-five percent of whose annual dollar volume of sales of goods or services, or both, is not for resale and is recognized as retail sales or services in the particular industry;

((~~(7)~~)) (6) "Wage" means compensation due to an employee by reason of employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to such deductions, charges, or allowances as may be permitted by rules of the director.

NEW SECTION. **Sec.**  A new section is added to chapter 49.46 RCW to read as follows:

(1) An employer-employee relationship exists when an individual performs labor or services for an employer. The party asserting that an individual is not an employee must establish by a preponderance of the evidence that the individual is an independent contractor or is otherwise not an employee under this chapter.

(2) A general contractor is not responsible for violations of a bona fide independent contractor or subcontractor under this chapter unless the general contractor exerts substantial control over the day-to-day work of the independent contractor or subcontractor. For purposes of this section, "general contractor" and "subcontractor" have the same meaning as in section 4(2) (a) and (b) of this act.

**UNEMPLOYMENT INSURANCE**

NEW SECTION. **Sec.**  A new section is added to chapter 50.04 RCW to read as follows:

The services of an independent contractor, as defined in section 3 of this act, are not services in employment under this title.

NEW SECTION. **Sec.**  A new section is added to chapter 50.04 RCW to read as follows:

Services performed by an individual for remuneration shall be deemed to be employment subject to this title. The party asserting that personal services are not services in employment must establish by a preponderance of the evidence that the individual is an independent contractor or that the services are otherwise not in employment under this title.

**Sec.**  RCW 50.04.100 and 1982 1st ex.s. c 18 s 14 are each amended to read as follows:

"Employment," subject only to the other provisions of this title, means personal service, of whatever nature, unlimited by the relationship of master and servant as known to the common law or any other legal relationship, including service in interstate commerce, performed for wages or under any contract calling for the performance of personal services, written or oral, express or implied.

((~~Except as provided by RCW 50.04.145,~~)) Personal services performed for an employing unit by one or more contractors or subcontractors acting individually or as a partnership, which do not meet the provisions of ((~~RCW 50.04.140~~)) section 20 of this act, shall be considered employment of the employing unit: PROVIDED, HOWEVER, That such contractor or subcontractor shall be an employer under the provisions of this title in respect to personal services performed by individuals for such contractor or subcontractor.

**Sec.**  RCW 50.04.298 and 2007 c 146 s 8 are each amended to read as follows:

For the purposes of this title:

(1) "Professional employer organization" means a person or entity that enters into an agreement with one or more client employers to provide professional employer services. "Professional employer organization" includes entities that use the term "staff leasing company," "permanent leasing company," "registered staff leasing company," "employee leasing company," "administrative employer," or any other name, when they provide professional employer services to client employers. The following are not classified as professional employer organizations: Independent contractors in ((~~RCW 50.04.140~~)) section 20 of this act; temporary staffing services companies and services referral agencies as defined in RCW 50.04.245; third-party payers as defined in RCW 50.04.248; or labor organizations.

(2) "Client employer" means any employer who enters into a professional employer agreement with a professional employer organization.

(3) "Coemployer" means either a professional employer organization or a client employer that has entered into a professional employer agreement.

(4) "Covered employee" means an individual performing services for a client employer that constitutes employment under this title.

(5) "Professional employer services" means services provided by the professional employer organization to the client employer, which include, but are not limited to, human resource functions, risk management, or payroll administration services, in a coemployment relationship.

(6) "Coemployment relationship" means a relationship that is intended to be ongoing rather than temporary or project-specific, where the rights, duties, and obligations of an employer in an employment relationship are allocated between coemployers pursuant to a professional employer agreement and state law. A coemployment relationship exists only if a majority of the employees performing services to a client employer, or to a division or work unit of a client employer, are covered employees. In determining the allocation of rights and obligations in a coemployment relationship:

(a) The professional employer organization has only those employer rights and is subject only to those obligations specifically allocated to it by the professional employer agreement or state law;

(b) The client employer has those rights and obligations allocated to it by the professional employer agreement or state law, as well as any other right or obligation of an employer that is not specifically allocated by the professional employer agreement or state law.

(7) "Professional employer agreement" means a written contract between a client employer and a professional employer organization that provides for: (a) The coemployment of covered employees; and (b) the allocation of employer rights and obligations between the client and the professional employer organization with respect to the covered employees.

**Sec.**  RCW 50.12.070 and 2013 c 250 s 1 are each amended to read as follows:

(1)(a) Each employing unit shall keep true and accurate work records, containing such information as the commissioner may prescribe. Such records shall be open to inspection and be subject to being copied by the commissioner or his or her authorized representatives at any reasonable time and as often as may be necessary. The commissioner may require from any employing unit any sworn or unsworn reports with respect to persons employed by it, which he or she deems necessary for the effective administration of this title.

(b) An employer who contracts with another person or entity for work subject to chapter 18.27 or 19.28 RCW shall obtain and preserve a record of the unified business identifier account number for and compensation paid to the person or entity performing the work. In addition to the penalty in subsection (3) of this section, failure to obtain or maintain the record is subject to RCW 39.06.010.

(2)(a) Each employer shall register with the department and obtain an employment security account number. Each employer shall make periodic reports at such intervals as the commissioner may by regulation prescribe, setting forth the remuneration paid for employment to workers in its employ, the full names and social security numbers of all such workers, and the total hours worked by each worker and such other information as the commissioner may by regulation prescribe.

(b) If the employing unit fails or has failed to report the number of hours in a reporting period for which a worker worked, such number will be computed by the commissioner and given the same force and effect as if it had been reported by the employing unit. In computing the number of such hours worked, the total wages for the reporting period, as reported by the employing unit, shall be divided by the dollar amount of the state's minimum wage in effect for such reporting period and the quotient, disregarding any remainder, shall be credited to the worker: PROVIDED, That although the computation so made will not be subject to appeal by the employing unit, monetary entitlement may be redetermined upon request if the department is provided with credible evidence of the actual hours worked. Benefits paid using computed hours are not considered an overpayment and are not subject to collections when the correction of computed hours results in an invalid or reduced claim; however:

(i) A contribution paying employer who fails to report the number of hours worked will have its experience rating account charged for all benefits paid that are based on hours computed under this subsection; and

(ii) An employer who reimburses the trust fund for benefits paid to workers and fails to report the number of hours worked shall reimburse the trust fund for all benefits paid that are based on hours computed under this subsection.

(3) Any employer who fails to keep and preserve records required by this section shall be subject to a penalty determined by the commissioner but not to exceed two hundred fifty dollars or two hundred percent of the quarterly tax for each offense, whichever is greater.

(4) Upon referral from the department of labor and industries pursuant to section 6 of this act, the employment security department may initiate procedures for improper recordkeeping and the recovery of contributions, interest, and penalties.

**Sec.**  RCW 50.12.072 and 2010 c 72 s 2 are each amended to read as follows:

(1) An employer that knowingly fails to register with the department and obtain an employment security account number, as required under RCW 50.12.070(2), is subject to a penalty not to exceed one thousand dollars per quarter or two times the taxes due per quarter, whichever is greater. This penalty is in addition to all other penalties and is in addition to higher rates for employers that do not meet the definition of "qualified employer" under RCW 50.29.010. This penalty does not apply if the employer can prove that it had good cause to believe that it was not required to register with the department.

(2) Upon referral from the department of labor and industries pursuant to section 6 of this act, the employment security department may initiate procedures for improper recordkeeping and the recovery of contributions, interest, and penalties.

**Sec.**  RCW 50.24.070 and 2011 c 301 s 18 are each amended to read as follows:

(1) At any time after the commissioner shall find that any contributions, interest, or penalties have become delinquent, the commissioner may issue an order and notice of assessment specifying the amount due, which order and notice of assessment shall be served upon the delinquent employer in the manner prescribed for the service of a summons in a civil action, or using a method by which the mailing can be tracked or the delivery can be confirmed. Failure of the employer to receive such notice or order whether served or mailed shall not release the employer from any tax, or any interest or penalties thereon.

(2) The commissioner must consider referrals based on a court finding of a violation of section 5 of this act and may pursue a claim for contributions.

**Sec.**  RCW 50.04.100 and 1982 1st ex.s. c 18 s 14 are each amended to read as follows:

"Employment," subject only to the other provisions of this title, means personal service, of whatever nature, unlimited by the relationship of master and servant as known to the common law or any other legal relationship, including service in interstate commerce, performed for wages or under any contract calling for the performance of personal services, written or oral, express or implied.

((~~Except as provided by RCW 50.04.145,~~)) Personal services performed for an employing unit by one or more contractors or subcontractors acting individually or as a partnership, which do not meet the provisions of ((~~RCW 50.04.140~~)) section 20 of this act, shall be considered employment of the employing unit: PROVIDED, HOWEVER, That such contractor or subcontractor shall be an employer under the provisions of this title in respect to personal services performed by individuals for such contractor or subcontractor.

**INDUSTRIAL INSURANCE**

**Sec.**  RCW 51.08.070 and 2008 c 102 s 2 are each amended to read as follows:

"Employer" means any person, body of persons, corporate or otherwise, and the legal representatives of a deceased employer, all while engaged in this state in any work covered by the provisions of this title, by way of trade or business, or who contracts with one or more workers, the essence of which is the personal labor of such worker or workers. Or as an exception to the definition of employer, persons or entities are not employers when they contract or agree to remunerate the services performed by an ((~~individual who meets the tests set forth in subsections (1) through (6) of RCW 51.08.195 or the separate tests set forth in RCW 51.08.181 for work performed that requires registration under chapter 18.27 RCW or licensing under chapter 19.28 RCW~~)) independent contractor as defined in section 3 of this act.

**Sec.**  RCW 51.08.180 and 2008 c 102 s 3 are each amended to read as follows:

"Worker" means every person in this state who is engaged in the employment of an employer under this title, whether by way of manual labor or otherwise in the course of his or her employment; also every person in this state who is engaged in the employment of or who is working under an independent contract, the essence of which is his or her personal labor for an employer under this title, whether by way of manual labor or otherwise, in the course of his or her employment, or as an exception to the definition of worker, a person is not a worker if he or she ((~~meets the tests set forth in subsections (1) through (6) of RCW 51.08.195 or the separate tests set forth in RCW 51.08.181 for work performed that requires registration under chapter 18.27 RCW or licensing under chapter 19.28 RCW~~)) is an independent contractor as defined in section 3 of this act: PROVIDED, That a person is not a worker for the purpose of this title, with respect to his or her activities attendant to operating a truck which he or she owns, and which is leased to a common or contract carrier.

NEW SECTION. **Sec.**  A new section is added to chapter 51.12 RCW to read as follows:

An employer-employee relationship exists when an individual performs labor or services for an employer. The party asserting that an individual is not an employee must establish by a preponderance of the evidence that the individual is an independent contractor.

NEW SECTION. **Sec.**  Sections 2 through 10 of this act constitute a new chapter in Title 49 RCW.

NEW SECTION. **Sec.**  If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. **Sec.**  If any part of this act is found to be in conflict with federal requirements that are a prescribed condition to the allocation of federal funds to the state or the eligibility of employers in this state for federal unemployment tax credits, the conflicting part of this act is inoperative solely to the extent of the conflict, and the finding or determination does not affect the operation of the remainder of this act. Rules adopted under this act must meet federal requirements that are a necessary condition to the receipt of federal funds by the state or the granting of federal unemployment tax credits to employers in this state.

NEW SECTION. **Sec.**  The following acts or parts of acts are each repealed:

(1) RCW 39.12.100 (Independent contractors—Criteria) and 2009 c 63 s 1;

(2) RCW 50.04.140 (Employment—Exception tests) and 1991 c 246 s 6 & 1945 c 35 s 15;

(3) RCW 50.04.145 (Employment—Exclusions) and 2008 c 102 s 1, 1983 1st ex.s. c 23 s 25, & 1982 1st ex.s. c 18 s 13;

(4) RCW 51.08.181 ("Worker"—Registered contractor and electrician exclusions) and 2008 c 102 s 5; and

(5) RCW 51.08.195 ("Employer" and "worker"—Additional exception) and 2008 c 102 s 4 & 1991 c 246 s 1.

**--- END ---**